

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA**

<b>STATE OF OKLAHOMA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>No. 05-CV-329-GKF(PJC)</b>
	)	
<b>TYSON FOODS, INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**STATE OF OKLAHOMA’S MOTION FOR LEAVE OF COURT  
TO SUPPLEMENT SUMMARY JUDGMENT RECORD**

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (“State”), and respectfully requests leave of Court to supplement the summary judgment record with certain “Cargill Grower Summary,” “Applications Chart” and related emails which the Cargill Defendants improperly withheld from production for a period of years. In support of this Motion, the State shows the Court as follows:

**I. Introduction**

On July 27, 2009, in accordance with this Court’s Order compelling production (Dkt. #2356), the Cargill Defendants (sometimes hereinafter also referred to as “Cargill”) produced to the State what was purported to be all materials read or reviewed by their expert, Dr. Thomas Ginn (“Dr. Ginn”), while acting in his former capacity as non-testifying consultant. Included in these materials was a certain “Summary of Cargill Grower Farming Operations” (“Cargill Grower Summary”), which has been in Cargill’s

attorneys' possession since at least November 2005 -- but had never before been produced. The Ginn materials also reveal the Cargill Defendants have withheld -- since March of 2006 -- information from a chart ("Applications Chart") as to the frequency and amounts of Cargill grower land applications within the Illinois River Watershed ("IRW").

The Cargill Grower Summary and Applications Chart contain highly relevant information which supports the State's circumstantial causation case against Cargill. Importantly, the Cargill Grower Summary contains detailed information regarding the land application practices of thirty-four (34) of the Cargill Defendants' IRW contract growers. Ex. A (Cargill Grower Summary). Specifically, the Cargill Grower Summary shows: (1) the amount of poultry waste annually generated at each of the Cargill grower farms; (2) which of the Cargill growers land applies poultry waste on their farms; (3) which of the Cargill growers sell all or some of the poultry waste; and (4) the identities of the persons who have purchased the poultry waste from Cargill growers. *Id.* For many of the Cargill growers, the Cargill Grower Summary actually shows the amount of poultry waste which is annually land applied on their property. *Id.*

The Applications Chart indicates that Cargill Growers most frequently land apply poultry waste during the spring months of April and May and shows the amounts of poultry waste land applied by individual growers during particular months. *See* Exs. L, M, and N.

Despite Cargill's possession of this information since the fall of 2005 and spring of 2006 respectively, Cargill and its lawyers have repeatedly assured the State and this Court that Cargill does not possess any such information. For instance, in response to certain of the State's interrogatories, Cargill has, on three separate occasions, sworn that

it has “**no information** regarding the amounts of litter used by its independent contract growers...” *See* Ex. B (Defendant Cargill Turkey Production’s (“CTP”) Resp. to State’s 9/13/07 Disc. Req. at 13 (Resp. to Interrog. #6)) (emphasis added); Ex. C (CTP’s Suppl. Resp. to State’s 9/13/07 Disc. Req. at 6 (Resp. to Interrog. #6)); Ex. D (CTP’s Resp. to State’s 3/17/09 Interrog. and RFP at 3-4 (Resp. to Interrog. ##1 & 2)) (asserting that CTP had “no additional” responsive information beyond its supplemental response to the State’s 9/13/07 Interrog. #6). Further, as recently as June 2009, in its Response to the State’s Motion for Partial Summary Judgment, the Cargill Defendants represented to the Court that they “do not generally know whether their individual contract growers in the IRW land-apply, sell, trade, or otherwise make use of the poultry litter generated by the Cargill Defendants’ turkeys but owned by the growers.” Dkt. #2200 at 5 (emphasis added).

In light of the Cargill Grower Summary, Applications Chart and related emails, it is clear that these repeated representations -- some made under penalty of perjury -- were demonstrably false. Less than two (2) months before trial -- and after the completion of dispositive motion briefing -- the State learned that, in fact, Cargill has for years been concealing extensive information regarding the land application practices of its contract growers. Were it not for Cargill’s concealment of -- and untruthfulness concerning -- this pertinent information, the State could have relied upon said information in support of its Motion for Partial Summary Judgment (Dkt. #2062) or its Response to Cargill’s Motion for Summary Judgment (Dkt. #2178). Instead, the State was denied the benefit of this relevant evidence due to Cargill’s misconduct.

Considering the fact that the State has only recently discovered the Cargill Grower Summary, Applications Chart and related emails through no fault of its own, the State should be permitted leave of Court to introduce these documents into the summary judgment record. Specifically, the State seeks to rely upon these newly-discovered materials as exhibits in support of its Motion for Partial Summary Judgment and its Response to Cargill's Motion for Summary Judgment as set forth herein.

## **II. Statement of Facts**

### **A. Dr. Ginn, the State's Motion to Compel and "Consulting" Materials**

Dr. Ginn was initially retained as a consulting expert by the Cargill Defendants in 2005 to evaluate information relating to the IRW and provide "general consulting advice" regarding available data. Dkt. #2011-2 (Ginn Depo. at 183, 208-09). However, Cargill transitioned Dr. Ginn to the role of testifying expert around May 2008. Dkt. #2011-2 at 218. Despite this shift from consultant to testifying expert, the Cargill Defendants refused to produce large portions of materials and information which Dr. Ginn reviewed or read during his previous role as consultant. The State filed a Motion to Compel. Dkt. #2011.

On June 2, 2009, the Magistrate Judge entered an Opinion and Order ("June 2 Order") granting the State's Motion to Compel. *See* Dkt. #2128. Per the June 2 Order, Cargill was to "disclose all information Dr. Ginn considered in his role as 'consultant,'..." Dkt. #2128 at 15. Cargill promptly filed an Objection to the June 2 Order. Dkt. #2234. On July 20, 2009, the Court issued an Order denying the Cargill Defendants' Objection. *See* Dkt. #2356. After the Court issued its July 20 Order, Cargill had no choice but to disclose the Ginn materials. Cargill purportedly produced all of the Ginn materials to the State on July 27, 2009.

**B. The “Cargill Grower Summary”, “Applications Chart” and Related Emails**

The newly produced Ginn materials show that as early as September 2005 Cargill’s attorneys knew that the locations of Cargill’s contract growers within the IRW would be relevant in this case and that Cargill would be required to disclose such grower-related information. Ex. E (9/8/05 Email Chain). On September 8, 2005, John Tucker, counsel for Cargill, sent an email to Tim Alsup and Tim Maupin of Cargill notifying them that they would: “need the locations of all former growers...”; and “probably...have to disclose as much history as” Cargill had. *Id.* at Ginn008817. Counsel ended that email by requesting that Mr. Alsup and Mr. Maupin “give thought as to how to get that information compiled” so that it could be provided to Dr. Ginn. *Id.*

On November 3, 2005, Kristen Shults Carney -- outside counsel for Cargill -- sent an email to Dr. Ginn and Gary Bigham, another of Cargill’s environmental consultants. Ex. F (11/3/05 email). Consistent with Mr. Tucker’s earlier email suggesting that grower information should be compiled and provided to Dr. Ginn, the Cargill Grower Summary was attached to Ms. Carney’s November 3, 2005 email. Ex. A (Cargill Grower Summary). This November 3, 2005 email and attachment clearly indicate that Cargill’s attorneys (and consultants) knew of the information contained in the Cargill Grower Summary by November 2005 at the latest.

As mentioned *supra*, the Cargill Grower Summary contains detailed information regarding thirty-four (34) of the Cargill Defendants’ contract growers within the IRW. Ex. A (Cargill Grower Summary). It also includes information regarding the Cargill-owned “Breeder Farms.” *Id.* The Cargill Grower Summary provides: (1) the names of the contract growers, (2) the location of each farm; (3) the size of each farm (in acres);

(4) the number of birds raised on each farm; and (5) the types of birds raised on each farm. *Id.*

Most importantly, the Cargill Grower Summary also provides certain “Litter Information.” Ex. A (Cargill Grower Summary). As shown above, this “Litter Information” indicates: (1) the amount of poultry waste annually generated at each of the Cargill grower farms; (2) which of the Cargill growers land applies poultry waste on their farms; (3) which of the Cargill growers sell all or some of the poultry waste; and (4) the identities of the persons who have purchased the poultry waste from Cargill growers.<sup>1</sup> *Id.*

Moreover, the Cargill Grower Summary provides the amount of poultry waste that many of the growers annually land apply on their properties within the IRW. Ex. A (Cargill Grower Summary). For instance, the document indicates that grower Rick Bickford annually land applies one-third (or 200 tons) of the poultry waste generated on his farm. *Id.* The Grower Summary further shows that Cargill grower Joua Moua annually land applies 100-125 tons of poultry waste on his property in Summers,

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<sup>1</sup> The information regarding the identities of those who purchase poultry waste from Cargill growers tends to prove that a portion of the waste from Cargill’s birds is land applied at locations within the IRW but outside of the confines of the grower properties themselves. This information is particularly pertinent in light of the Court’s recent Order denying the State’s Motion in Limine to Preclude Testimony of Defendants’ Witness, Andy Davis, Ph.D. Dkt. #2447. The Court denied the State’s Motion based in part on the misunderstanding that “[t]he State has taken the position in this lawsuit that all poultry growers are disposing of poultry litter on their property...” *Id.* at 5. In fact, it is the State’s position that “[t]he vast majority of the poultry waste generated by Defendants’ birds is and has been land applied throughout the IRW in *close proximity* to where it is generated.” Dkt. #2062 at 16 (emphasis added). The State has always been aware that a portion of the poultry waste is sold and land applied at non-grower locations within the IRW. And, as the Cargill Grower Summary proves, Cargill has long been aware of this, too. Despite this knowledge, Cargill did not provide Dr. Davis with any information as to specific areas where land application had actually taken place and agreed that Dr. Davis should assume that land application only takes place on the grower properties. Ex. O (Davis Depo. at 84-86).

Arkansas. *Id.* And the document indicates that Cargill grower Joel Reed applies two (2) tons of poultry waste per acre on his half of his 300 acre property. *Id.*

On March 2, 2006, Sheryl Law, also one of Cargill's environmental consultants, sent to Dr. Ginn and others a litter "applications" chart ("Applications Chart"). Exs. K, L, M and N (3/2/06 Email and Attached Chart). The cover email indicates that the Applications Chart was "prepared at request of counsel." Ex. K (3/2/06 email). The first part of the Applications Chart is a bar graph which shows the "Timing and Frequency of Litter Application (170 total observations from 11 nutrient plans)" by month. Ex. L (Applications Chart -- Bar Graph). This bar graph clearly indicates that that poultry waste is most frequently land applied in the IRW during the spring months of April and May. *Id.* The second part of the Applications Chart denotes the months during which certain individual Cargill growers land apply poultry waste on their properties within the IRW. Ex. M (Applications Chart -- Ind. Growers). The last part of the Applications Chart is a detailed table which provides the amounts of poultry waste land applied by individual Cargill growers by month. Ex. N (Applications Chart -- Table). For instance, the table shows that during one application in April, Cargill grower "Fisher" land applied 225 tons of poultry waste on 80 acres and that during one application in August, Cargill grower "Swrenger" land applied 35 tons of poultry waste on 22 acres. *Id.*

### **C. Cargill's Repeated Misrepresentations Concerning Grower Information**

On September 13, 2007, the State served on all Defendants certain Interrogatories and Requests for Production ("September 13, 2007 Discovery Requests"). Ex. G. Included in these September 13, 2007 Discovery Requests was Interrogatory No. 6 as follows:

For poultry waste generated at your own poultry growing / feeding operations and/or poultry growing / feeding operations under contract with you in the Illinois River Watershed since 1980 that has not been transported out of the Illinois River Watershed, please state, broken down by year, how the poultry waste was disposed of (e.g., land application within the Illinois River Watershed, burning as fuel within the Illinois River Watershed, etc.) and the amount disposed of in each particular manner.

Ex. G (September 13, 2007 Discovery Requests, Interrog. #6).

On November 16, 2007, Defendant Cargill Turkey Production, LLC (“CTP”) submitted its Responses to the State’s September 13, 2007 Discovery Requests (“Initial Responses”). Ex. B. In part, CTP responded to the State’s Interrogatory No. 6 as follows:

“CTP has **no information** regarding the amounts of litter used by its independent contract growers and directs Plaintiffs [sic] to the contract growers themselves for this information.”

*Id.* at 13 (emphasis added). CTP’s Initial Responses, including its Response to Interrogatory No. 6 were sworn to and verified by H. Steven Willardsen, President of CTP. *Id.* at 40. During his deposition, Mr. Willardsen testified that he did not prepare the interrogatory responses, did not have personal knowledge of much of the information provided in those responses and relied primarily on Mr. Alsup, Mr. Maupin and legal counsel to provide responsive information. Ex. H (Willardsen Depo. at 137-144).

On May 13, 2008, CTP submitted its Supplemental Responses to the State’s September 13, 2007 Discovery Responses (“Supplemental Responses”). Ex. C. As part of these Supplemental Responses, CTP again asserted that it had “**no information** regarding the amounts of litter used by its independent contract growers...” *Id.* at 6.

On July 21, 2008, the State took a 30(b)(6) deposition of the Cargill Defendants. During this deposition, Cargill designee Timothy Maupin testified that the Cargill



Defendants “don’t track the poultry litter on our contract producers’ farms.” Ex. I (7/21/08 Cargill 30(b)(6) Depo. at 84).

On March 17, 2009, the State served another set of Interrogatories and Requests for Production (“March 17, 2009 Discovery Requests”) on CTP. Ex. J. Interrogatory No. 1 asked CTP to “identify each instance (including, where available, specific date, specific location, tonnage of waste applied, acreage upon which it was applied, and STP before application) in which poultry waste generated at your poultry feeding operations, or at poultry feeding operations under contract with you, has been land applied within the IRW as fertilizer, identifying all witnesses to the application and all documents evidencing it.” *Id.* at 1. On April 20, 2009, CTP responded by stating that it had “no additional information responsive to this Interrogatory beyond CTP’s supplemental response to Plaintiff’s September 13, 2007 Interrogatory 6” and referred the State to that supplemental response. Ex. D (CTP Responses to March 17, 2009 Discovery Requests at 3). In other words, by reference, Cargill had for a third time certified under penalty of perjury that it had “no information regarding the amounts of litter used by its independent contract growers...” Ex. C (Supplemental Responses at 6) (emphasis added).

Lastly, as noted above, on June 18, 2009, the Cargill Defendants filed papers with this Court asserting that they “do not generally know whether their individual contract growers in the IRW land-apply, sell, trade, or otherwise make use of the poultry litter generated by the Cargill Defendants’ turkeys but owned by the growers.” Dkt. #2200 at 5. The Cargill Grower Summary, Applications Chart and related emails prove that these were falsehoods.

### III. Argument

**PROPOSITION:**     **The State Should Be Permitted Leave of Court to Supplement the Summary Judgment Record with the Cargill Grower Summary, Applications Chart and Related Emails Because They Are Highly Relevant and Because They Contain Newly Discovered Facts**

#### **A.     The Cargill Grower Summary, Applications Chart and Related Emails Are Highly Relevant**

The Cargill Grower Summary, Applications Chart and information contained therein are highly relevant to matters currently at issue on summary judgment. For example, in their Motion for Summary Judgment, the Cargill Defendants claim that the State has “failed to identify any evidence that any Cargill Defendant or Grower has placed any ‘wastes’ in a location where they are likely to cause pollution of the State’s waters.” Dkt. #2079 at 14. Further, in their Response to the State’s Motion for Partial Summary Judgment, the Cargill Defendants assert that “although Plaintiffs [sic] offer evidence that poultry litter has been applied in the IRW generally, Plaintiffs’ [sic] moving papers identify no evidence that any poultry litter has *actually* come to be located at *any* particular farm site, much less at any site for which Plaintiffs [sic] may seek to hold Cargill or CTP liable.” Dkt. #2200 at 13 (emphasis in original). The Cargill Defendants also aver that the State has “identified only one land application event allegedly on a CTP contract grower farm in their four-year investigation...” Dkt. #2200 at 7.

In essence, the Cargill Defendants are criticizing the State for failing to come forward with the very type of information contained in the Cargill Grower Summary and Applications Chart -- information that the Cargill Defendants had been concealing from the State for a period of years.

While the State is confident that it has already provided more than adequate evidence in support of its Motion for Partial Summary Judgment and in response to Cargill's Motion for Summary Judgment with respect to causation, the Cargill Grower Summary and Applications Chart provide more comprehensive information as to specific locations within the IRW where Cargill growers have "placed ... 'wastes' ... where they are likely to cause pollution of the State's waters." Dkt. #2079 at 14. This evidence further establishes causation with respect to all of the State's causes of action. The State has already provided the Court with soil test phosphorus ("STP") data which shows that many Cargill grower fields are saturated with phosphorus with STP levels of 1,424, 1,063, 884, 811, 735, 725 and 468 lbs/acre. Dkt. #2178-13 (Attachment A).<sup>2</sup> This STP data, coupled with the information in the Cargill Grower Summary and Applications Chart, further establishes that Cargill growers' land application activities have created a situation where poultry waste from Cargill's birds does -- and is likely to -- cause pollution of the water bodies of the IRW. Such STP and land application evidence is important in part because "[l]and application of poultry waste to the karst terrain of the [IRW] means that constituents of this waste...travel readily through the soils and underlying geologic media to discharge at and into ground water springs and surface streams throughout the [IRW]." Dkt. #2178 at 5-6 (quoting Dkt. #2088-6 (5/14/09 Fisher Aff. ¶12)).

Additionally, the information from the Applications Chart showing that poultry waste is most frequently land applied in April and May strongly supports the State's position in its Motion for Partial Summary Judgment that "[t]he majority of the land

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<sup>2</sup> It is noteworthy that Cargill did not produce any of this STP data. Rather, the State obtained it from state agency grower files.

applications of poultry waste occurs between February and June, a period of time when nearly half of the annual rainfall occurs.” Dkt. #2062 at 17.

Also, the cover emails, along with Cargill Grower Summary and Applications Chart themselves, disprove the Cargill Defendants’ assertion to this Court -- in its Response to the State’s Motion for Partial Summary Judgment -- that they “do not generally know whether their individual contract growers in the IRW land-apply, sell, trade, or otherwise make use of the poultry litter generated by the Cargill Defendants’ turkeys but owned by the growers.” Dkt. #2200 at 5. Indeed, the documents tend to establish Cargill’s knowledge that the application of poultry waste in the IRW presents a risk of environmental impact due to phosphorus run-off and leaching. Such knowledge is particularly relevant in establishing the applicability of Restatement (Second) of Torts § 427B. Under Restatement (Second) of Torts § 427B, one is liable for the acts of one’s independent contractor if one is aware or should be aware that in the ordinary course of doing the contract work, a nuisance or trespass is likely to result. The State has moved for summary judgment on the § 427B issue.

The Cargill Grower Summary, Applications Chart and emails of November 3, 2005 and March 2, 2006 show that Cargill has long had specific knowledge of its contract growers’ land application practices within the IRW, including amounts of waste that are land applied by the growers and locations where the waste is land applied. Further, other evidence presented by the State shows that Defendants -- including Cargill -- have long known or should have known that the practice of land applying this poultry waste in the IRW can, and does, result in the run-off of phosphorus from the land and into the rivers and streams of the IRW and Lake Tenkiller. *See, e.g.*, Dkt. #2062 (Facts, ¶¶ 28, 32, 34-37, 39, 42-44 and 46-51). Thus, the Cargill Grower Summary, Applications Chart and

cover emails are relevant in showing that, under § 427B, the Cargill Defendants should be held liable in tort for the conduct of its contact growers.

**B. The Cargill Grower Summary and Applications Chart Contain Newly Discovered Facts which Cargill Concealed from the State until *After* Summary Judgment Briefing was Completed**

As established *supra*, through no fault of its own, the State did not discover the highly relevant Cargill Grower Summary and Applications Chart until after summary judgment briefing was completed. In fact, the record reveals that Cargill concealed these documents and information contained therein for a period of years. It specifically appears that Cargill and its lawyers repeatedly misrepresented the existence of that information and Cargill's knowledge thereof. Under such circumstances, the State cannot be faulted for seeking to supplement the record after briefing is complete. Because this Motion is filed in advance of the summary judgment hearings, Cargill will not be prejudiced if it is granted. And any prejudice Cargill could claim with respect to this Motion is due to its own misconduct. On the contrary, the State has already been prejudiced by Cargill's concealment of the Cargill Grower Summary and Applications Chart as it has been deprived of pertinent evidence for a period of years which, if timely produced, could have been relied upon by the State's experts or in questioning Cargill witnesses during 30(b)(6) depositions. The State should not be further prejudiced by being disallowed the use of this newly discovered information to support its Motion for Partial Summary Judgment and in opposing Cargill's Motion for Summary Judgment.

WHEREFORE, premises considered, the State respectfully requests leave of Court to supplement the summary judgment record with certain "Cargill Grower Summary," "Applications Chart" and related emails which the Cargill Defendants improperly withheld from production for a period of years.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on the 11<sup>th</sup> day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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